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VOL. 28 NOVEMBER, 1952 No. 2

Expanded Quarters for the Association

By Stevens Fargo
President, Los Angeles Bar Association

Stevens Fargo

The Board of Trustees determined, at its October 28th meeting, not to engage the Petroleum Club quarters at the Biltmore. This action followed a careful study of 1,406 replies to the questions posed to the membership, 726 members voting NO and 680 YES.

A lot of us have long cherished a dream that some day our Association would own quarters adequate for its needs. The Association of the Bar of the City of New York has an impressive building on 44th Street containing a fine library, hearing rooms and extensive offices. I heard at the American Bar Association convention that the Chicago Bar Association has just purchased a thirteen-story building to house its activities, including its section meetings and restaurant facilities. They told me that their committees do a great deal of their work while meeting for lunch. The Bar Association of San Francisco expanded its quarters about four years ago into a beautiful lounge and restaurant overlooking the bay.

The large eastern associations work under different conditions from ours. They have developed substantial endowment funds, impelled by their need to maintain libraries, whereas our County library is maintained from a portion of filing fees. The legal population is somewhat more concentrated than ours, and membership in some of them appears to me more restricted than with us. Most members in New York pay annual dues of $100—in Chicago $60.

Fine quarters take planning. We originally hoped to start with a modest lunch club in connection with a restaurant. No suitable

rooms could be found in the downtown area. We surveyed and abandoned plans to operate our own food and drink facilities on the grounds of large initial expense and probable operational headaches. The answer seemed to be to rent and equip quarters attached to a central hotel or club.

While a substantial part of our membership is opposed to the quarters selected for a variety of reasons, a very sizeable group strongly favors the taking of expanded quarters of some sort. We feel that this is a project for the years ahead. We have learned a great deal in our search for quarters and in the canvassing of members' opinions. Our excellent committee should continue its efforts and may eventually offer a plan, perhaps fortified by endowments, which will meet with the hearty approval of our whole membership. The Board strongly feels that no expansion plan, however excellent, should be accepted if any segment of the membership should disapprove for any reason, financial or otherwise.

Let Us Be Frank About Comparative Negligence

By William J. Palmer*

Wm. J. Palmer

IF A statute introducing to California what is commonly called the doctrine of comparative negligence should be enacted, it ought to come into being because the people want it and because it will be good for the people, not because lawyers want it.

A number of recent public opinion polls have indicated a serious need for informative and good-will publicity in behalf of the legal profession. Not long ago we had a demonstration which, I am sure, caused many lawyers to reflect soberly upon their standing and reputation as a class with the public. Induced only by suspicion, playing upon a good deal of ignorance of law and legal procedure, the people and some of their newspapers, with striking readiness and resentment, censured lawyers, accusing them expressly or inferentially of having brought about a change in the law controlling the judicial termination of joint tenancy estates, and of having done so to provide more fees for the lawyers. Against the profession as such, the suspicion and the charge were ridiculous, but the incident had far-reaching effects, not yet overcome, forcefully suggesting a reasonable vigilance to prevent a repetition.

In respect to the projected law of comparative negligence, it is, in a way, unfortunate that the legal profession, to which laymen ought to be able to look for impartial guidance in the matter, has a big stake in the project and a self-serving pecuniary motive in advocating it. In this circumstance, this fact of private interest ought frankly to be disclosed to the public and to the legislature.

WHEN ADVOCATE AND CLIENT ARE CO-OWNERS

Virtually every negligence case is handled by plaintiff's attorney on a contingency-fee basis. The most common contract gives to the lawyer at least a 33⅓ percent share of recovered compensation in the event of a trial. His share may reach 50 percent, and

*Judge of the Superior Court, Los Angeles County, 1932 to date.

is likely to do so if he advances costs. This contingency-fee practice is, in a way, a benevolent one, and often reflects a good deal of sporting blood and charitable impulse on the part of lawyers. However, it has two aspects which are not wholly beneficial: (1) The client, risking nothing or little, having nothing to lose and everything to gain, is under no restraint of contemplative discretion in deciding whether or not to play a "long-shot gamble," to add one more lawsuit to the taxpayers' burden, to draft one more citizen as a defendant into the time-taking annoyance of litigation, and to provide casualty insurance companies one more reason for increasing rates. (2) The lawyer, now being a part owner of the cause of action, such as it may be, and certain to suffer a substantial financial loss if the cause fails, does not have the perspective and disinterestedness which usually contribute much to the understanding, judgment and policy of a counsellor.

To the lawyer it would be a boon of no mean proportions if, although his client bore 90 percent of blame for an accident, recovery on a 10 percent basis of elastic damages still could be had. If by legislation much of the gamble could be taken out of the negligence-case business for the lawyer, if he could be reasonably sure of some recovery every time he went into court for a plaintiff in such a case, the legislation would be significantly lucrative for lawyers.

In a legitimate program of self-improvement, one society of good lawyers has posted a substantial sum of money to be used to bring about the enactment of a law of comparative negligence in California. To their credit let it be said that the fact of this campaign fund was released to, or, at least, was not concealed from, the press and public.

CONCERNING PRECEDENTS

After admitting their own pecuniary interest in a law of comparative negligence, lawyers, I believe, would act wisely if they would refrain carefully from speaking half-truths and misleading statements in advocating the doctrine.

One misleading impression that I have heard attempted is that a "band wagon" of comparative negligence is on its way across the land and that California ought to be "up and coming," in stride with the times, and ought to climb onto the wagon. We can, if we wish, for purposes of promotion—with the incidental possi-

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Observations On The Patent Codification Act

By Herbert A. Huebner*

Herbert A. Huebner

THE patent laws of the United States have now been cast into a code, to become effective January 1, 1953, to be cited, "Title 35, United States Code, section ....." Various statutory provisions and Supreme Court decisions have been thereby integrated, a number of uncertainties clarified, and some of the New Deal court ideas legislated out.

The "new" law reaffirms the old fundamental principles of patent law upon which the industrial supremacy of this nation was nourished—that a man who invents something new and useful is entitled to be rewarded if his invention is adopted, that his patent is a contract with the United States by which he may for seventeen years exclude anyone from utilizing his patented invention without his consent, that he is free to license it to whom and for what royalty or price he chooses, and that anyone who infringes is liable for damages and subject to an injunction. It expressly permits him to claim his invention by using the broad word "means," and it reaffirms the doctrine of equivalents, namely, that the substitution of elements similar in nature, function and result for those things shown in the patent do not excuse the infringer. It recaptures the long established doctrine, recently diluted by the Supreme Court, that not only is the direct infringer guilty, but also those who aid and abet him, the contributory infringers. It adopts in part and rejects in part, the modern attack on patents known as the "misuse" theory. It defines what is invention, and cuts off the judicial interposition that an invention must be the result of a "flash of genius." It gives patents back to the researcher, the farmer, the tinkerer, even the man who stumbles upon the inventive idea. How he made his discovery or invention no longer counts, as it was in the beginning of our

*Of the California and New York Bars, past Chairman of the Patent Conference of the State Bar of California.

Patent System. It restores the axiomatic presumption, too frequently discarded by some courts, that a patent is presumed to be valid.

The Code is retroactive in many respects, and the advantages inherent in it should inure to the benefit of most patents now extant, and those now under prosecution in the Patent Office and yet to be issued.

With the improvements in practice and proceedings before the Patent Office looking toward some streamlining there, this paper will not deal. Our purpose is to point out some of the major substantive provisions.

A patent ordinarily must be applied for by the inventor. He can assign the application or the patent to anyone. The invention must not, previous to his invention, have been known or used by others in this country, or published or described in a printed publication anywhere, or in public use or on sale in this country. If the publication, public use or sale occurred more than a year before his application is filed, the bar is absolute, regardless of how early he made the invention. These things are substantially similar to the old law.

The new law, however, enlarges the field of patentable subject matter by providing that the term "process" upon which patents are grantable, includes a *new use* of a known process, machine, manufacture, composition of matter, or material. The old statute did not mention a new use as offering patentable subject matter, and coverage along that line has been rather camouflaged and of doubtful validity.

It would appear relatively easy to apply the new law in a case where a material was known to exist but no one knew what to do with it until the patentee *discovered for the first time* a useful application for it. If the use were not obvious to one having an ordinary skilled knowledge of the material, the patent should stand.

When you come to a new use of a material for which other uses are already known, the test of invention may not be made quite so easily. I will designate this as a "subsequent" use. To be patentable, a "subsequent" use will have to survive a more critical examination as to whether it was obvious to a skilled person having knowledge of the earlier use, and a probable con-

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Are You Guilty, Boss?

By Millicent Pollard Hunter*

Millicent Pollard Hunter

NOW, just don't shrug and turn the page, Boss—this just might apply to you.

Twenty odd years in offices all over the world have taught me to be just as fussy about choosing a boss as the boss is about choosing me. That's only sense. Screeds have been written on educating the poor office girl (and, heaven knows, I suppose she needs it) but all too little on educating the boss. So, for what it's worth, here goes:

How to dictate in one easy lesson. Perhaps you find it easier to dictate while looking out the window or pacing the floor; but please don't. Your face may not be any oil painting but I doubt if the girl's looking, so turn right around and face her squarely. She won't bite. If you put your feet on the table at home, then I suppose it's all right to put them on the desk at the office. But remember this, there's something very insulting about a boot in the face.

Don't mumble. Now, open the mouth a little wider. It won't hurt. There, that's better. Do your chewing at the table and give the words a break. Try to speak evenly; then, whether your dictation is slow or fast, the ordinary stenographer can get it. It's the choppy, stop-and-start, back-and-fill, race-and-drag men who stump us. Be careful of your "ifs," "ands," "ors," etc., and the big words will take care of themselves. Be sure to drop your voice at the end of a sentence or dictate the periods. Nothing is much worse than getting tangled up in yards of phrases with no place to stop. Most stenographers don't like the punctuation dictated. Assuming that you have a reasonably intelligent girl and that you are satisfied with her, the chances are she'll know a lot more about punctuation than you do. If neither of you can punctuate, then go ahead and "comma" and "semi-colon" to your heart's content; at least one of you will be happy!

*For over 20 years secretary to prime ministers, diplomats, generals and attorneys.

Please do give the girl the letter you're answering and don't dictate addresses in full unless there is some special reason for it: *i. e.*, the letter is extremely confidential and you don't trust the girl, you need the letter to which you are replying, or you want to make a change in the address. Any girl will bless the boss who lets her take the names and addresses direct from the letters or files. It certainly cuts down the margin of error.

Spelling out proper names is all very well, but remember that the girl is usually a few words behind you and if you start spelling before she's up to you and ready to listen, it can sometimes be a complete waste of breath. So wait just a second, or tell her the name is in the file or on the letter or paper or what-have-you. Life will be sweeter.

Smoke gets in her eyes. You may smoke, yes. But if you can stick to cigarettes, please do. Save the big black cigars for weddings and births. Lots of girls find cigar smoke a little overpowering, but, aside from that, consider her cleaning bills. I quit one very good job because the Boss didn't quit smoking cigars. My closet smelled like Havana for weeks, despite heavy cleaning bills which I could ill afford. Remember, she's on a budget, and have pity. That cigar smoke clings and it doesn't smell like any geranium. Also, don't let your cigarettes sit cooking in the ash tray, with a thin stream of stagnant smoke creeping across the girl's face. How would you like it? So, either pick up or put out. Your Luckies may be easy on your throat, but when a-cook they certainly aren't on hers. For some strange reason, most girls don't seem to object to a pipe. A boss with a pipe clamped tight in his teeth is somehow rather comforting and restful.

Let the draft get you. If you have something a little difficult to dictate, let the girl get it out in triple-spaced rough draft. Then you can make all the changes you like and no one will be hurt. To get out a long job in final form, sometimes with lots of carbon copies, takes a good deal of time and care; and to see that long job changed beyond all recognition, or just enough changed on each page to make rewriting necessary, is, as a little friend of mine says, "heart-rendering." Knocking out a rough draft is quick and rather fun, and then, Boss, you need have no qualms about making changes and your final brain-child will be a thing of beauty and a joy forever, not a messed-up, erased,

(Continued on page 73)

Postponement Of Taxable Gain On Corporate Liquidations

By the Committee on Taxation of the Los Angeles Bar

(This is another in the series of brief statements intended as tax refresher notes for the assistance of lawyers in general practice.)

THE Federal Income Tax rate on income accumulated by Personal Holding Companies is confiscatory and is intended to be so. Accordingly, such corporations cannot accumulate anything with the exception of gain realized on the sale of capital assets. The result is that the time comes when working capital is depleted and the business cannot expand if there is a desire to have it do so. The corporate form, therefore, is a substantial disadvantage.

There are alternative solutions that may be pursued. One is to induce some of the shareholders to sell their stock, so that a majority of the stock is not held by five or fewer indivduals.[1] That is not always possible. Shareholders are sometimes reluctant to dispose of stock that has produced a good yield, and widows, especially, who do not understand that the corporation has been bleeding itself white distributing dividends, often foreclose this solution.

An alternative solution is to liquidate the corporation and to operate as a partnership. That involves a capital gains tax and where the shareholders' basis for their stock is low in comparison with the value of the assets it may appear to be prohibitive, especially if the corporation's assets are not liquid. Section 112(b)(7), a remedial section, offers a solution that often solves the problem.

It is too lengthy to quote here, but it provides in substance that with the exception of a corporate shareholder owning 50% or more in value of the stock of a corporation, the shareholders may elect to liquidate the corporation completely during one calendar month of 1951 or 1952. Forms for such written election are provided by the Bureau and are binding after the liquidation, although it may turn out that pursuing this section was disadvantageous.[2]

Individuals and corporate shareholders are treated differently. With respect to an individual, he must report as ordinary dividend income that part of the gain which represents his ratable share of

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[1] I. R. C. 501(a)(2).

[2] Lewis B. Mayer Estate, 15 T. C. 850.

the earnings and profits of the corporation accumulated after February 28, 1913, determined as of the close of the month in which the liquidating distribution occurred, but without diminution by reason of distributions made during such month. The remainder of the gain is taxable as long or short term capital gain, depending on the holding period of the stock; *but only to the extent that the distribution consists of money, or of stock or securities acquired by the corporation after August 15, 1950.*[3]

As for a corporate shareholder, the liquidation gain is taxable to the extent of the money plus stock or securities acquired by the liquidating corporation after August 15, 1950. However, if the corporate shareholders' ratable share of the post-1913 earnings and profits, determined as in the case of an individual, is greater, then the gain is taxable to that extent.

It is obvious that if a corporation has no post-1913 earnings and profits, there will be no ordinary dividend income, and if the assets of the corporation consist of investments in property other than money, or stock or securities acquired after August 15, 1950, then none of the gain will be taxable. The crucial factor, of course, is to be positive of the amount of post-1913 earnings and profits before making an election to liquidate under Section 112(b)(7). Disastrous consequences can follow by accepting the book surplus figure as representative of post-1913 earnings and profits.

The basis of any property received by a shareholder in the liquidation, pursuant to his election, is the same as the basis of his redeemed stock, decreased in the amount of any money received and increased in the amount of any gain recognized in the liquidation.[4] This follows, of course, from the fact that the gain on a liquidation is either not recognized or that if it is, it is recognized only in part.

Although this reminder relates primarily to Personal Holding Companies with respect to Section 112(b)(7) liquidations, nevertheless the Section applies to all corporations.

In conclusion we mention that Section 25031(j) of the California Bank & Corporation Tax Law (as amended by Chapter 18, Laws 1952) is the counterpart of Section 112(b)(7) of the Internal Revenue Code.

[3] I. R. C., Sec. 112(b)(7)(E).
[4] I. R. C., Sec. 113(a)(18).

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of November, 1927, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

IN THE balloting of California attorneys for the Governors of the new integrated State Bar, 6645 attorneys out of 7742, or 85.8% members of the bar, voted. San Francisco with 1427 lawyers eligible to vote, reported 1365 votes or 95.6%—**Oscar K. Cushing** and **Albert A. Rosenshine** were elected over **F. M. McAuliffe** and **Edwin V. McKenzie** in that district. In Los Angeles, 2803 out of 3239 lawyers, or 86.5%, voted, **William J. Hunsaker** and **Frank James** defeating **Rollin McNitt** and **Ben S. Hunter** for the governors from the Ninth and Tenth Districts. **Joseph J. Webb** of San Francisco was elected the first President of the State Bar.

* * *

Dell A. Schweitzer, well known local attorney, has been appointed Police Commissioner by unanimous action of the City Council.

* * *

Blown on his way by a strong tail wind Col. **Charles A. Lindbergh,** New York-Paris flyer, established a quick-trip record between Detroit and New York in two hours and 43 minutes. The air line distance is 500 miles.

* * *

F. M. Andreani, prominent Los Angeles attorney, has been confirmed as a member of the Board of Harbor Commissioners to succeed Judge **Robert M. Clarke** recently resigned.

* * *

Secretary of the Treasury **Andrew Mellon,** in presenting the views of the administration (Republican), has proposed the

following tax reductions: (1) Reduction of 1½ per cent in the 13½ per cent corporation tax with estimated revenue loss of $135 million annually. (2) Partnership basis of taxation of corporations of under $25,000 income and with 10 or less stockholders, with probable $35 million revenue loss. (3) Repeal of the Federal Estate Tax.

* * *

Philip M. Tucker of Boston, originator of the chain letter petition to "draft" Calvin Coolidge for the Republican nomination for the Presidency, announced that in deference to the President's desire not to run again, he has ordered the letters withdrawn.

* * *

Chester H. Rowell, a member of the State Tax Commission, has gone to Washington to present California's views for the retention of the Federal Estate Tax. California's fight against repeal of the federal law is predicated on the belief that once the government estate charge is removed, a drive will be opened for a wholesale repeal of state laws, although the eastern tax association, in seeking support of the California lawmakers, said this source of revenue should be left to the states. Retention of California's tax is held necessary to the state government, as it represents approximately $8 million annually.

* * *

Raymond L. Haight and **William C. Mathes,** both formerly associated with **Newlin & Ashburn,** have formed a new law partnership for general practice.

* * *

The first issue of the Southern California Law Review has just come off the presses. Contained in this number are articles by Dean **Justin Miller** discussing compromises of criminal cases, Professor **William B. Burby** of the Law School on problems arising in escrow transactions, and Dean **Carpenter** of the Oregon Law School on *stare decisis.*

* * *

J. W. Morin, who has been practicing law in Pasadena 20 years, has been elected president of the Pasadena Bar Association. Other new officers are **Raymond G. Thompson, Walter J. Richards,** and **Brooks Gifford.**

(Continued on page 53)

Brothers-In-Law

By George Harnagel, Jr., Associate Editor

George Harnagel, Jr.

THE **New York** State Bar Association has gone on record in favor of the extension of social security coverage to lawyers on a voluntary basis and is urging adoption of the Lodge bill which would do just that. The resolution by which the Association took this action declares that the Social Security Act provides the cheapest available insurance and that self-employed lawyers should have the opportunity to participate in it.

* * *

"Lawyers work much with and for corporations, and rich clients. I wish you many rich and generous clients. But do not forget the poor. Give a due stint of your labours to their service. Be not too hasty to turn away from your door the impecunious client. The files of every attorney ought to include some cases for which he cannot even hope to be paid. That is one of the differences between being a professional man and being a mere business man."—From an address of Mr. Justice Wilson of the Supreme Court of **British Columbia** to a group of law students upon their call and admission to the bar of that province.

* * *

The **Riverside County** Bar Association and the Riverside County Medical Association recently held a joint meeting at the Mission Inn. A panel of lawyers and doctors discussed "The Medical Expert Witness."

* * *

From the last report of the Committee on Civil Rights of the **Illinois** State Bar Association:

> "The committee was established out of the growing recognition that the bar has a special and crucial responsibility to endeavor to preserve the great heritage of freedom embodied in our Bill of Rights. . . .
>
> "One of the initial projects of the committee involved the civil rights of individuals subjected to arrest and detention in day to day police administration. . . .

"At the request of the committee, the Board of Governors authorized the publication of a pamphlet stating the law as to the rights of an arrested person in the plain terms of laymen. This pamphlet, entitled 'Your Rights When Arrested,' was printed by the Illinois State Bar Association, and approximately 5,000 copies of the pamphlet were circulated widely throughout the state. In addition, many newspapers, both in Chicago and downstate, published all or important parts of the pamphlet."

* * *

"James Patrick McGranery may be the Attorney General of the United States to everyone else, but he was just another bum male driver to a woman on Walnut Street the other day . . . Jim was driving serenely along with a smile on his face and a far-away look in his eyes when he smacked kerplunk into the rear of another car . . . The lady driver really let him have the grapes of McGrath."—From "Trivia," a department of *The Shingle,* publication of The **Philadelphia** Bar Association.

* * *

"Here in the west, in a country still in its infancy, young lawyers have the greatest privilege ever given to man."—From Jerry Giesler's address to the 1952 annual dinner of the **Oregon** State Bar as reported in its *Bulletin.*

* * *

Some months ago we referred to a three-generation law firm in Montgomery, **Alabama,** and asked if we could match (or outmatch) that in **Southern California.** Cliff Hughes writes us as follows:

". . . I leave it to you whether the following qualifies.

"The Meserve clan, headed by former president of the Los Angeles Bar Association, Edwin A. Meserve, were all born in the state of California, graduated from the University of California, were admitted to the California Bar in the years set opposite their names as follows:

Edwin A. Meserve—1885
Shirley E. Meserve—1912
J. Robert Meserve—1942,

and they are all practicing law together as members of the firm of Meserve, Mumper & Hughes. The senior member celebrated his 89th birthday on July 28 of this year. I wonder whether there is any native son of California practicing at the bar who can match the above."

The Board of Governors of the **Iowa** State Bar Association has voted to increase annual dues from $10 to $15.

Opinion of Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 193

(June 18, 1952)

ADVERSE INFLUENCES—CONFLICTING INTERESTS—CONFIDENTIAL INFORMATION.

A member of the profession has asked this Committee for its opinion respecting the ethical propriety of an attorney's actions under the following statement which he represents to be the facts:

A woman died intestate. She left no issue. Her heirs are three sisters and two step-children. The step-children have commenced a proceeding to determine heirship. One of the sisters is the Administratrix of the estate. The attorney for the Administratrix "is now representing the sisters of the deceased, using all of the information he gained while acting as attorney for the Administratrix in contending that the assets of the estate . . . were the separate property of the decedent." It appears that the attorney, acting as and by virtue of his position as attorney for the Administratrix, has obtained certain documents and information from the step-children and is using same to further the cause of the Administratrix and her sisters as contestants. The step-children object thereto.

There is no canon expressly applicable. The Canons of Professional Ethics of the American Bar Association and the Rules of Professional Conduct of the State Bar of California, respecting the representation of conflicting interests relate only to the acceptance of employment adverse to a client or former client.

In the instant case, the attorney for the Administratrix does not purport to be representing any interests in conflict with a client or former client. This opinion must, therefore, consider the question *de novo* as a matter of general propriety.

If the Administratrix was not one of the heirs or related to them or otherwise interested in the conflicting claims of the heirs and there was no expense involved to the estate thereby, it would seem that the attorney for the Administratrix might act as attorney for one of the heirs against the others (see Estate of Healy, 137 Cal. 474, 478 (1902)). In such case, the Administratrix would be considered as an officer of the Court, holding the estate as a stakeholder (Estate of Lynn, 109 A. C. A. 495, 500 (1952))

and indifferent as between the real parties in interest (Estate of Kessler, 32 Cal. 2d 367, 369 (1948)).

The Committee observes that the facts as stated show this to be a contested case in fact as well as in form, and the attorney for the Administratrix should not take sides in a probate proceeding where a *bona fide* contest is involved.

The facts as stated to the Committee indicate that the attorney, while acting for the sister as Administratrix, would be presumed to have been acting impartially and to have received information as such from the step-children. An attorney should not act for a contestant in a probate proceeding where he has gained information from adversary parties during his representation of the contestant as Administratrix. There is a dictum to this effect in the law (see Jones v. Lamont, 118 Cal. 499, 503 (1897)), and in any event, it is the opinion of this Committee that the attorney for the Administratrix should not accept the subsequent employment in the heirship contest and for the attorney to act therein would be improper under the facts stated.

This Opinion, like all Opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

OPINION NO. 194
(June 24, 1952)

PRACTICE OF LAW—LAY INTERMEDIARIES—DIVISION OF FEES.

It is improper and unethical for an attorney to render a legal opinion to a lay consulting firm for the purpose of having the lay consulting firm pass the opinion on to its customer as an attorney's opinion and billing the lay consulting firm, which in turn bills its customer for a larger fee to include its share in the services rendered.

It is improper and unethical for an attorney to handle legal problems for a client through a lay consulting firm and bill the lay consulting firm for his services rendered, which firm in turn bills the client for a larger fee to include its share of the services rendered.

The Committee has been asked the following questions:

> "1. Is it proper or improper for the attorney, at the request of the lay consulting firm, to answer the legal problems raised by such companies with the lay consulting firm, directing solutions to the lay consulting firm, having the lay consulting firm pass on the solutions as from the attorney, billing the lay firm at an established fee for services thus rendered, and in turn leaving it to the lay consulting firm to bill the companies at a larger fee to include their share in the service rendered?
>
> "2. Is it proper or improper to join with a lay consulting firm, in handling the legal problems for such companies as one part of an industrial relations consultation program, dealing in process directly with and representing such companies for the lay consulting firm, and again billing in the manner specified in the question immediately above?"

These questions present two problems, both of which are answered by the Canons of Professional Ethics of the American Bar Association.

Canon 35, A. B. A., states:

> "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be

personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

"A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."

Canon 34, A. B. A., states:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

Such conduct would also violate Rule 3 of the Rules of Professional Conduct of the State Bar of California, which provides:

"A member of the State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor, except with a person licensed to practice law, shall he directly or indirectly share compensation arising out of or incidental to professional employment; nor shall he directly or indirectly aid or abet any person not so licensed, or any association or corporation, to practice law or to receive compensation therefrom. A member of the State Bar shall not knowingly accept professional employment offered to him as a result of or as an incident to the activities of any person not so licensed or of any association or corporation that for compensation controls, directs or influences such employment, except from an insurer whose financial interest in the subject matter renders such employment necessary and proper for the protection of such financial interest or from a person or party, who, by reason of guaranty or endorsement, has a direct financial interest in the subject matter of such employment, and who, because of such direct financial interest is permitted to participate in or control the subject matter of such employment."

The Committee also wishes to state that the unprofessional conduct of an attorney employed by a lay consulting firm to perform professional legal services for the customers of the firm would not be cured by having the attorney bill such customers for his legal services direct. Such an arrangement would involve indirect solicitation and violate Canon 27 of the Canons of Professional Ethics of the American Bar Association. See

also Opinion 35 of the Committee on Professional Ethics of the American Bar Association.

It appears clear that the conduct in question would violate the canon of legal ethics and an attorney who became part of such an arrangement would be engaging in unprofessional conduct.

This Opinion, like all Opinions of this Committee, is advisory only. (By-Laws, Art. VIII, Sec. 3.)

SILVER MEMORIES—NOVEMBER 1927

(Continued from page 46)

At Geneva at the League Preparatory Disarmament Commission, the Russian delegation put forward its own plan for complete abolition of all armies and navies, condemned the search for security as dilatory tactics, and demanded a world-wide conference for next spring to draft a disarmament agreement along the lines of its proposal.

* * *

A motorist who crosses a railroad grade crossing, depending on his bearings or signals to escape danger, and takes no further precautions to protect his life and property, does so at his own risk, according to a ruling by the U. S. Supreme Court, delivered by Associate Justice **Holmes.**

* * *

A committee named by mayor "Big Bill" **Thompson** to search the Chicago Public Library for traces of the British lion, learned that Queen Victoria helped to found the library after the fire of 1871, by sending several thousand books. An application to a court to enjoin the Mayor from burning any books brought a denial of intention to burn.

* * *

The Communist Party of Soviet Russia has expelled **Leon Trotsky** and **Zinovieff** at the instance of **Joseph Stalin** (Djugashville).

The Los Angeles Bar Association Annual Christmas Jinx will be held at the Breakfast Club, 3201 Los Feliz Boulevard, Friday, December 19, 1952. Dinner and entertainment. Watch for formal announcement. Reservations on a "first come, first served" basis.

COMPARATIVE NEGLIGENCE

(Continued from page 38)

bility of deception—aggregate under the general heading of comparative negligence a variety of laws, and, having done so, say that there now exist in the United States umpety-ump statutes on comparative negligence. In the Federal Employers' Liability Act, we have what, we may assume for purposes of this discussion, is a true example of the rule now commonly known as the doctrine of comparative negligence, applicable, however, only in favor of an employee suing his employer for injury suffered in the course of employment. By this rule, unless plaintiff was solely to blame for his injury, contributory negligence is only a proportional, never a complete, defense, the rule providing that the damages awarded the employee "shall be diminished in proportion to the amount of negligence attributable to such employee."

THE LAW'S SOLICITUDE FOR EMPLOYEES

Giving the employee the benefit of the rule of comparative negligence in cases embraced within the Federal Employers' Liability Act is an expression of that protective and paternal policy and attitude that now pervades our entire jurisprudence in behalf of employees in their relations to employers, a policy founded on the theory that, as between the two, the employee is the weaker, is more subject to the stress of need, more dependent generally, and hence more in need of the law's solicitude.

In such actions the one claim that is presented to the court for consideration is that of the employee or, if he died from his injuries, of his next of kin. I never have known of the employer filing a cross-demand against the employee in such a case. This federal law approaches insurance for the safety of the employee while engaged in his employment, but as the employee pays nothing for the "policy," he is docked proportionately for his own negligence. The law is designed for and is limited in its application not only to a specific relationship, but to a selected group of risks, among whom a tendency always is at work to eliminate the poorer risks. Such a law obviously is not a valid precedent for a universal application of its rule of comparative negligence.

When John Plaintiff and George Defendant come before us in the typical automobile-accident case, they come as equals; they bear no relationship that gives rise to any cause for special solici-

tude or legal advantage or paternalism in favor of either party as against the other. John Plaintiff's claim often is countered with a cross-claim by George Defendant.

CALIFORNIA, TOO, PROTECTS EMPLOYEES

Already in California, as in many states, we show a marked solicitude for the employee injured in the course of his employment. If, for example, an employer has failed to provide insurance under the Workmen's Compensation Act, and he is sued by an employee for injuries suffered in the employment, contributory negligence is no defense whatsoever, and other special advantages are given the employee. (Labor Code, Secs. 3706, 3707, 3708.) And when Labor Code Sec. 2801 is applicable to an action by employee against employer, if by comparison the negligence of the employee was slight and that of the employer was gross, plaintiff may recover, although his damages may be diminished "in proportion to the amount of negligence attributable" to him.

This principle that pits slight negligence against gross when the facts authorize it, and thereby in specific cases destroys partially or completely the defense of contributory negligence, is a rule of comparative antiquity that has had general application in some American jurisdictions, has been abandoned as impractical and unsound by some states, and still prevails in a few states—in Illinois, Kansas and Georgia, I believe, and possibly elsewhere. (114 A. L. R. 831, 835, 837; 38 Am. Jur. 916-919; 19 Eng. Rul. Cases 207.)

THE WISCONSIN LAW

Wisconsin has a law of comparative negligence, but one that is basically, significantly and intelligently different from the rule of the Federal Employers' Liability Act. Under the Wisconsin law, contributory negligence is a complete defense unless the negligence of the plaintiff was "not as great" as that of the defendant. If plaintiff was equally to blame with the defendant, or more to blame, then plaintiff may not recover. But if his negligence was the lesser, then he may have damages, but the award to him shall be reduced proportionately.

THE PROPOSAL OF THE BAR DELEGATES

The Conference of State Bar Delegates, in its most recent session, recommended for universal application in California a law of comparative negligence that would go all the way in imitation of the rule of the Federal Employers' Liability Act, and would go

farther in giving that rule universal application. The vital language of the restricted federal law was copied in the draft of a proposed California act. That language, I may say in passing, is a fine specimen of inexpertness and ambiguity in drafting, language that has been given intelligibility only by the judicial legislation which it made necessary, a process not yet consistent or complete.

This projected general California statute would permit plaintiff to recover something even if found to have been 99 percent to blame for his own injury. Although I have requested advocates of this doctrine of comparative wrong to help me, I have not yet learned of any American state having such a law. Let us be honest at least with ourselves: What the proponents of this doctrine really propose is not that California climb onto any band wagon, irresistibly lumbering its way across the land, but rather that she be a pioneer and venture into an experimental realm still uninviting or even foreboding to all, or nearly all, her sister states. California, in their judgment, would be an ideal bellwether. If the people of California should want a law of comparative negligence for general application, it would be a disappointing reflection against our profession if we could do no better than parrot the highly specialized federal statute.

THE LAW OF CONTRIBUTORY NEGLIGENCE— WHAT IT IS AND WHY

What shall we tell the people about the existing law of contributory negligence? I heard one advocate of the comparative negligence doctrine, a prominent lawyer, put the matter in this way:

> "Under the present law, if the plaintiff was guilty of the teeniest-weeniest bit of negligence, he cannot recover."

Of course, no such law exists. To be guilty of contributory negligence a person's conduct must, first, be careless to the degree that it falls short of the conduct of only an ordinarily prudent person; and, secondly, such conduct of his own must be a proximate cause of his injury, concurring as such with the negligence of another. Although, as a matter of law, it is not a test of negligence that one might have avoided an accident, it is a fact, the significance of which cannot be overemphasized, that in nearly all, if not all, true cases of contributory negligence, plaintiff would have avoided injury if he himself had exercised ordinary care.

Let us make known to the people that the law of contributory negligence is one of several rules that stem from a basic disciplinary policy, attitude and dignity of our jurisprudence. It is a policy that both reflects and contributes to the moral fibre of a people, that provides disciplinary measures, without necessity of criminal action, for certain wrongdoing, that keeps in the foreground for the attention of all concerned, standards of conduct known to be necessary for the preservation of a decent civilization. For example, this juristic policy says: "If you, yourself, have broken a contract, one of your penalties is that you may not recover damages for a breach by another. Even if we were able to compare the seriousness and effect of your breach against that of the other party, we would feel that our courts ought not to be burdened with the claims of one contract breaker against another."

The same policy says that he who comes into equity must come with clean hands. It says: "If you want the courts to be available to you for equitable assistance and relief, see that your own conduct measures up to a reasonable standard in morals, law and equity."

The same disciplinary principle announces generally that a per-

son may be estopped by his own conduct from complaining of the conduct of another. And from this same underlying conception of social discipline came the law of contributory negligence, which says to a guilty plaintiff: "You, too, violated the rules, and unnecessarily endangered your own safety, and possibly that of others. We leave you where we found you."

THE COUNTENANCE OF THE LAW

In all this, the countenance of the law is indeed stern and purposeful. Maybe the people do not wish it that way. I do not know. But this mien of the law is no different from that of the referee who, in the last minute of a football game, denies a team a winning touchdown because one of eleven teammates, too eager, was offside; nor of the official who orders the star tackle out of the game because in the heat and excitement of battle he threw a punch instead of a tackle; nor of the boxing referee who denies victory to a sure winner because he lost his head for a trice and delivered a low blow; nor of the baseball umpire who, when the game "is all tied up at two and two," orders a team's leading batter off the diamond because, under the tension of a crucial contest, he did not restrain his back talk. These umpires in such lesser activities of life have no rule of comparative wrong.

IN THE GAME OF THE QUICK AND THE DEAD

In society, we deal with a lot of people, and of tremendous variety. Some are unscrupulous, some dishonest, some mentally or morally weak, some recklessly reckless and others constitutionally careless. They play in a game on the highways where every player is armed with an instrument of death. Few of them have the alertness, muscular judgment or skill needed to qualify for a football team or a softball league. In California we have one registered motor vehicle for every 2.6 persons, and the number of vehicles continues to grow. If those who advocate the doctrine of comparative wrong will fairly submit their case to the people, they will pose the question whether or not the rules of the game may wisely be relaxed, whether or not in this game of the quick and the dead, the umpires ought to be more lax than they are on the fields of sporting contests.

A LAYMAN'S PROPER QUESTION

When the layman asks "just what will this proposed law of comparative negligence do for me?" What shall we tell him? We ought, I think, to advise somewhat as follows:

(1) If the law should accomplish a fraction of what certain lawyers expect of it, it probably would increase your public liability insurance rates.

A prominent lawyer is quoted as saying that the proposed law would reduce insurance rates. The layman who, like myself, has had no course in the abstruse calculus of irreconcilables, will have difficulty understanding how the measure can bring the desired pecuniary benefits to plaintiffs and their lawyers without someone putting up the cash. In the Nation's Business for June, 1952, it was reported that stock casualty companies estimated their 1951 losses from automobile liability business to have been $100,000,000 and that mutual companies probably suffered comparable losses. The cost of public liability insurance could become prohibitive for a large segment of automobile drivers. Every person who drives on the highway without such insurance reduces your chances of compensation for injury.

(2) If the law should do only part of what its lawyer-proponents expect of it, it probably would increase your taxes. The additional litigation that such a law is expected to encourage could not be handled without additional expense to the taxpayer.

A prominent lawyer is quoted as saying that the proposed law would decrease litigation. Our inquiring layman persists in bobbing up. His approach to the matter is one of simple and honest curiosity. His familiarity with the law of probability has come from the everyday experiences of life and not from a course in higher mathematics. With a furrowed brow of puzzlement, he wonders how a law, the sole purpose of which is to create numerous causes of action that otherwise would not exist, would reduce the probability of litigation.

(3) Your chance of being a defendant in an accident case is just as great as your chance of being a plaintiff, so, in respect to possible litigation, the probability of your being favored by a law of comparative negligence is no greater than the probability of your being injured by it. You do have a chance in either direction. The law could bring you a judgment in spite of your own contributory negligence. But let us have an example of other possibilities. You have had an accident for which, you sincerely believe, you were not in the least to blame. You were shaken up somewhat and suffered nervous shock, but you are an honest and busy man. After a night's rest, you returned to your

desk, and a mechanic picked up your car for repairs. Jones, the other driver in the accident, suffered substantial injuries and, after consulting his lawyer and being advised of the law of comparative negligence, he proceeds, with more care and foresight than he exercised on the highway, to avoid minimizing his injuries. Skipping numerous details in our hypothetical story, we hasten to the trial. The jury finds that Jones was 90 percent to blame for the accident and you 10 percent; that Jones suffered damage in the sum of $100,000 and you in the sum of $1,000. So you owe Jones $10,000 and he owes you $900, with the consequence that out of an accident for which Jones was either solely or almost entirely to blame, you must pay him $9,100 and his costs and you must pay also for all your own damage!

(4) You can either experience, resist, yield to, profit from, suffer from directly or indirectly, the temptation to build up and pad a claim for damages, a temptation which, in all probability, would be significantly enhanced by the proposed law. It is quite possible that, as a general practice, the padding of claims, too, would be in proportion to a claimant's negligence.

(5) If abolishing the law of contributory negligence should remove a deterrent to reckless driving, the life and health of yourself and your loved ones would be submitted to increased hazards on the highways.

THE ARGUMENT FOR COMPARATIVE NEGLIGENCE

What is the argument for a law of comparative negligence? The most powerful argument is this: When the trier feels that, although the plaintiff was contributively negligent, his negligence was far less reprehensible than that of the defendant or that its causal contribution was minor as compared with that of defendant's conduct, an injustice seems to be done in denying such a plaintiff relief and in permitting such a defendant to escape all liability.

This argument, however, lends its support to a measure such as the Wisconsin statute or to a law applying the principle of slight-vs.-gross negligence heretofore mentioned, but not to a law like that now proposed for California, whereby a plaintiff chiefly to blame for an accident, nevertheless, may recover damages.

The only other argument that I have known to be advanced for comparative negligence runs like this: Brown was 65 percent to blame for an accident, and White was 35 percent to blame. It

is only simple and sound morality to require that Brown pay 65 percent and White 35 percent of the total damage inflicted. This bit of forensic has the ring of a good argument if we do not question it critically. The introduction of a purported moral principle prompts the response that under any enlightened moral culture, we do not attach moral responsibility to purely accidental results. If we were to base moral judgment on fortuity, we occasionally would have to hold a thoroughly unselfish, loving and innocent-minded mother morally responsible for the accidental death of her own child. We see the cruelty of such doctrine when we thus carry it to its logical conclusion. It is equally absurd whenever applied.

NOT A FIELD FOR CLAIRVOYANCE

True, occasionally the trier in a negligence case will be convinced that a party's conduct was marked by moral culpability, but no one ever has proposed a law that would authorize or require the trier in such a case to limit liability to those morally culpable and to apportion the liability among them according to the comparative degrees of their culpability.

The legislature, lawyers and courts all together do not have the clairvoyance and divine wisdom that would be necessary to always determine and apportion moral responsibility in accident cases, and it is important to keep in mind that the question with which we are concerned is a practical, mundane question of where to place legal, not moral, responsibility. It would be quite possible for a person's conduct tinged with moral culpability to play a smaller part in the proximate causation of an accident than the conduct of another wholly free of any moral blame.

EVEN MATHEMATICS HAS ITS LIMITATIONS

The argument for a mathematical apportionment of liability falsely assumes the possibility of mathematical pro-rating of blame. Sometimes the trier of fact, in good judgment and conscience, after hearing the evidence in a negligence case, can say: "Although both parties were at fault and both contributed in some degree to causing the accident, I am satisfied that the chief, major cause of the accident was the negligence of....."

And sometimes the trier, in equally good judgment and conscience, can say: "I am satisfied that both parties were equally at fault, or virtually so, and that both must bear substantially the same blame for the accident."

But to go beyond such broad observations and to endeavor to apportion in precise percentages the blame for an accident, is to attempt to apply mathematics to a situation that does not admit of mathematical division or appraisal; it is to venture into a field of pure guesswork or into what is worse, a field of caprice and arbitrariness.

THE SIGNIFICANT FACT AGAIN

Finally, the argument for a moral-mathematical proration of liability overlooks the significant fact pointed out previously, that in nearly all, if not all, true cases of contributory negligence, plaintiff would have avoided the accident if he had exercised ordinary care.

No one yet has expressed or even conceived a reason why John Jones, who was chiefly to blame for an accident that would not have happened if he had exercised only ordinary care, should have a cause of action against anyone else involved in the accident.

I have not chosen to dignify as an argument the divination that "comparative negligence is inevitable." This slogan of inevitability has a familiar ring. Since Henry George, a good and great man and a brilliant thinker, published his "Progress and Poverty," he never has been without sincere followers to tell us that the single tax is inevitable. In the propaganda technique of communism, the slogan of inevitability is a cardinal device, the master psychological weapon to hold up the morale of dupes and to break the morale of resisters. There was a period during World War II when many wise observers regarded the fall of England and the British Empire as inevitable; but Winston Churchill did not believe in inevitability. And not many years ago a prominent, sincere and intelligent American expounded the inevitability of dictatorship of the Nazi and Fascist type!

PATENT CODIFICATION ACT

(Continued from page 40)

sideration will be whether the subsequent use is analogous or non-analogous to the earlier one. If analogous, patentability may be doubtful. If non-analogous, protection should ordinarily be granted.

This portion of the new law appears to cloak many existing patents with validity heretofore considered exposed to fatal attack.

The Code, moreover, defines invention for the first time, affording some yardstick, at least, to replace the hundreds of judicial decisions which have in one way or another declared what constitutes invention. The definition is in the negative, but at least has meaning. It says that the patent should not be granted if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. Moreover, "Patentability shall not be negatived by the manner in which the invention was made."

Heretofore, if an invention be made by two people jointly they both had to sign the application. Sometimes one could not be found, or by reason of hostility would refuse to join. That is corrected by the new law, so that under certain specified circumstances, the signature of one will be accepted.

Another technical attack against patents has been abolished. Heretofore, a patent was invalid if applied for by a single inventor, if in fact it was a joint invention patented, or if mistakenly two men secured the patent as joint inventors on an invention actually made by only one of them. By the new Code, these technical errors can be corrected, either before or after issuance of the patent, and a mistake in this respect does not invalidate the patent.

A problem which the general attorney has often faced arises when an inventor, usually an employee under contract, having assigned an invention to the employer, subsequently decides to hold out, and refuses to execute a patent application when requested. Under the old law, the assignee had to bring an action in court to compel the inventor to sign, and sometimes the delay

carried beyond the period when a valid patent application could be filed.

This is changed by the Code, which provides that the assignee, or one who can show by a written instrument that he is entitled to an assignment, of an invention, can file the patent application if the inventor refuses or cannot be found. If the occasion arises, careful study of the provision should be made (35 U. S. C. 118); but the important thing to remember and do in advance of any controversy is to secure a full assignment with an adequate identification of the invention, if the same be in existence, or a comprehensive definition of what is to be assigned in future. It is the writer's opinion that properly drawn employer-employee invention agreements, if lawful and enforceable under the laws of the State, will enable valid filing by the employer of patent applications under this section of the new law.

The saving provision will not eliminate the ultimate issue as the respective rights of the assignor and assignee, employee and employer, but it will permit the application to be filed and prosecuted. Such alone will create a cooling off period, during which the rights may be agreed upon, and should the assignee fail to obtain a patent, the controversy would die for want of fuel.

For many years the patent statutes have recognized the right to a narrowed reissue, and the courts have enlarged the law to include broadened reissues. Some patents are reissued to correct ordinary defects arising from inadvertence or mistake, others to narrow the claims to avoid subsequently discovered prior art which renders the original patent invalid. Still others are reissued to broaden the claims, and consequently the scope of the patent, where justified, and the reasons for not having made broad claims originally are satisfactorily explainable. While the courts have sanctioned broadened reissues, such patents have been subjected to more than casual scrutiny, partly because the statutes have never said that a man could broaden his patent by reissuing it. Moreover, the courts have adopted a rule, borrowing theory from another provision in the law, that a broadened reissue application must be filed within one year from the date of grant of the original patent.

This cloudiness has been removed by the new Code. Section 251 of the new Title 35, expressly provides for reissues by reason of the patentee claiming more or less than he had a right to claim

in the patent, and it gives him two years (instead of the judicial one year) within which to file a broadened reissue. There never has been and is not now, a time limit within which to correct ordinary mistakes or present narrower claims, as the public is not injured by so doing.

The federal courts, not the old patent statutes, have long recognized the principle, with variations in the different courts, that intervening rights may accrue to some member of the public between the date of grant of a narrow patent, and the granting of a broadened reissue. The point is, that relying on the narrow claims, the stranger goes into business manufacturing a generally similar item, but is careful to keep it outside the scope of the patent claims. Suddenly, without warning, he is confronted with a reissued patent containing claims of such breadth that he infringes. He has been mislead. The courts have usually given him some measure of protection, as by excusing his infringement for a period, and groping for the balance of equities as to whether or not he should be allowed to continue. Uniformity of treatment has been lacking.

By the new Code, the courts are clothed with the express authority to provide for the continued operations by the "infringer," if he did not infringe any valid claim of the original patent carried over into the reissue, and of course, if preparations and investment were made by the "infringer" prior to the grant of the reissue. This protection extends to successors in business of the "infringer." The court may decree the extent of the continued operations, and the terms under which the same may proceed, in accordance with equitable rules for the protection of investments made or business commenced before the grant of the reissue.

This provision is interpreted by the writer to mean that the courts have discretion to order the granting of a compulsory license, upon reasonable royalty and other terms, and in extreme cases royalty free where the equities are strongly with the "infringer" and to require a royalty would impose undue hardship. An example of the latter case would be where the "infringer" had actual knowledge of, and relied upon, the original narrow patent, fairly avoided it, made heavy and specialized investment in facilities to manufacture, and contracted to supply at prices with

a narrow margin of profit which would not allow for royalty, or was paying all the royalty he could to some other patentee.

The law has been that whoever, without authority, manufactures, uses or sells a patented invention, infringes the patent. With judicial interpretation of the statutes, the courts came to recognize the doctrine of contributory infringement, *i. e.,* that one who aids and abets a direct infringer is himself liable as a contributory infringer—a joint tortfeasor. The United States Supreme Court recently castrated this rule, and some of the lower courts followed. Until the high court knocked it out, several persons each of whom knowingly and intentionally supplied some important part of a device assembled by someone else, which device upon completion was an infringement, were all in the legal soup together.

Then came the time, under the modern rejection of contributory infringement, when a half dozen different concerns each supplied a part, knowing all about its purpose, but the chances were that the only one which the courts would hold liable was the concern which put the parts together. If that concern were financially insecure, and could not respond to a judgment, the poor patentee had his day in court for nothing.

That has been changed by Congress. Once again, as of January 1, 1953, contributory infringers are liable. 35 U. S. C. 271. The section must be studied for definitons, but the substance is present, and the rule is clearly stated. An exception is made to relieve from liability the manufacturer of a staple article or commodity of commerce suitable for substantial non-infringing use. He is not charged with the responsibilty of tracing his product to make sure that it does not become an ingredient of an infringing thing. The person at whom the law is aimed is the one who actively induces infringement, or who sells a component constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement, and which is not a staple article as referred to.

There is nothing in the old patent statutes about "misuse" of patents. That is a product of the mind of the modern Supreme Court. The basic principle announced is in substance that the owner of a patent has no monopoly beyond his patent, and he cannot lawfully use his patent in such a way as to derive profit from exploitation of subject matter associated with, but beyond the boundaries of the patent. For example, one who holds a patent on a machine for putting salt tablets in cans during the processing of foods, has no right to couple with the use of the machines the requirement that salt tablets (which are unpatented) be purchased from him. If he does so, the courts (not the statute) deprive him of the right to enforce his patent, until he has "purged" himself. Inability to realize a fair reward because the nature of the patent does not lend itself to conventional royalty treatment, is no excuse. The misuse doctrine has permeated so deeply and spread so widely that it now involves special study, and is virtually one of the text-book defenses. An extreme instance of its application occurred in Los Angeles a few years ago, when a federal judge (now deceased), ruled that a patentee was guilty of misuse of his patent because the patentee had brought suit against a mere contributory infringer!

The new Code does not legislate away the misuse or illegal extension doctrine, but does remove some of the more onerous applications of it. Thus, Section 271 sanctions as lawful, deriving revenue from acts which without license would constitute contributory infringement. Thus, the patentee in many cases can law-

fully collect royalty from a licensee who manufactures a material part, but not the whole, of a patented device. His patent was in jeopardy if he did that before. In addition, it will not be unlawful to sue a contributory infringer.

From the time of the early Supreme Court decisions, which were landmarks in Patent Law, inventors were permitted to use the word "means" in their claims, thus—means to accomplish a defined function instead of specifying by name the part which performed the function. This gave the patent claims greater breadth than obtainable by specifying the exact agency or element which performed the function, for obviously more substitutes would fall within the term "means" than words defining a specific instrumentality. In modern decisions, the Supreme Court qualified this old rule by holding invalid patents which, in the opinion of the court, used the word "means" to identify the exact point of novelty or the crux of the invention. This began to cast some doubt on the validity of hundreds of patents which must be analyzed to determine whether the inventions were true combinations properly definable as to elements by the term "means," or whether there was some particular feature which contributed to the patentable novelty and, therefore, was not entitled to be so defined.

The new Code clarifies this subject, to some extent at least, by providing that an element in a claim for a combination may be expressed as a "means" or "step" for performing a specified function without the recital of structure, material, or acts in support thereof, and such claims shall be construed to cover the corresponding structure, material, or acts described in the specification, and equivalents thereof.

It is the writer's opinion that this provision will place in good standing numerous patents heretofore of doubtful validity. If the invention be broad, a wide range of equivalents will be included within the term "means." If the invention be narrow, the word "means" will be construed narrowly and related more specifically to the instrumentality illustrated and described in the patent. The language is even susceptible of construction which would save the validity of patents using the word "means" at the exact point of novelty, or in defining the crux of the invention. In such instances the public would not be harmed by an over-

claiming of the invention, since it would be the duty of the court to read the proper limitations into the patent claim.

Finally, the Code declares that a patent shall be presumed valid. The statutes never before said so. The courts did, for many years, until the standard of invention rose with the new trend, and the Patent Office was accused of spawning patents on gadgets which required no inventive concept. Taking their cue from the high court, many recent decisions in patent cases by the district courts and courts of appeals have relegated the rule to the dead files. The presumption of validity is no longer recognized, they said, in effect, if not in words.

Fortunately for inventors, and owners of patents, Congress has now restored the age-old, axiomatic doctrine that a patent shall be presumed valid. Sec. 282. Henceforth, a patentee will have more than a mere piece of paper when he enters court. This is as it should be. It is up to the Patent Office to maintain the proper standard of invention, and with the responsibility placed there, as it is by the Code, there will be an incentive to issue patents with care, and according to standards determined not by

single reference to what is new among the scientific genii, but broadly what is new and inventive in each field, complex or simple, as the case may be—each invention graded according to its own class.

ARE YOU GUILTY BOSS?

(Continued from page 42)

caret-filled abortion. So draft as much as you like and change as much as you like. It's nothing to be ashamed of, and I've found that the real top-notchers are draft addicts. You'll save time in the end and be more satisfied with the final job.

If you are inclined to make lots of pencil changes in your work, try to have a system about it. Simple changes need no special attention; but, when you insert long phrases or sentences, don't weave all over the various margins, write on the other side of the sheet without so much as an "over," and leave out half the carets. There's no need to have the poor, bewildered girl standing on her head and breaking her lovely neck, even if you would like to wring it sometimes. It's oh so simple to put in a nice, clear caret and write A, B, C, etc., as the case may be, through the alphabet, and over again, if necessary—thus: A-1, A-2, etc.; then just take another page altogether and write out your inserts, being sure to letter or number them properly. If you feel a draft needs a good many changes, you can dictate the inserts to the girl and take a look at those, too. Or have another draft run off. Anyway, rough drafts make smooth finals.

Some bosses think best with pencils gripped in their hot little fists. Handwritten drafts are permissible, if you're sure your handwriting is reasonably legible. It so often isn't, bless you. And a word here: don't expect your secretary to do nine-tenths of her typing from handwritten drafts and still be able to take rapid dictation should the occasion arise. That's not cricket.

A word to the late-starters. I've often wondered if it made bosses feel important to wait until five minutes before a job is wanted and then say, "Now, will you rush that out; they're coming in for it in a few minutes." Some girls are the type to take this sort of thing in their stride; others go all shaky and when they try to type get extreme impediment of the fingers. On the occasions when it is necessary to ask the girl to get work out under pressure, don't keep asking her how she's getting along, or, worse still, breathe down her neck. The poor thing will

either end up hypochondriac or ulcerated. And it'll be your fault, Boss. Of course, there are bound to be emergencies. *When they are unavoidable,* turn the work over to the girl with as clear instructions as posible—and LEAVE HER ALONE. There are some things she can sweat out better on her own.

Don't be a mystery man. Please do leave word with someone—preferably your secretary or the telephone operator—when you go out, and where you're going if that isn't too staggeringly confidential. Trying to find a wayward Boss is very frustrating, so just take that extra second to say, "Miss Nosey, I'll be at the Club if anyone wants me." Or, "You won't be able to reach me but I'll report in about 3:30 and see if there are any messages." Easy? I assure you it will put you right up there in the Pin-up Boss class. Secretaries aren't hired to institute search parties, and if they start barking like a bloodhound someday, you'll have only yourself to blame.

The cruelest cut of all. Sarcasm is definitely, but definitely, out. Nothing is more soul-destroying to a conscientious girl than Sarcasm. It may make *you* feel like a Big Shot, but it makes her feel very, very small. She may be a buttoned-up little thing who can't answer you back. So resist that little sarcastic retort and pick on someone your size, Boss.

She's human, too. When you're worried and nothing will go right, or when you have spring fever, there's always some of your work that you can stall along until tomorrow. Muttering "Mananas," perhaps you pick up your hat and disappear for the day. So when your faithful Girl Friday sends work in with typos, split infinitives, or just plain nonsense, try to be patient. It's probably one of her off days—it happens to all of us. If she makes a mistake once in a while, well, even Queens do it.

Praise for the praiseworthy. Nobody asks you to throw around pretty words and compliments promiscuously, but within reason a little praise is a mighty fine thing. When your girl has done a difficult job for you and done it well, if you'll just say, "That's a fine job, Miss Worker; thank you very much," she'll go away beaming and singing your praises (well, not literally, perhaps) and you will have a slave for life, I expect. The simple "thank you" and a little praise for work well done are fine things and make for an exceedingly pleasant partnership between Girl and Boss. Try it and see. Just once won't hurt, will it?

You can skip this. Sex has no place in the office and I doubt if it's found there (much!) except in lurid tales. Anyway, here goes: No pinching, Boss! END